
Santa Clara Law Review

Volume 13 | Number 2 Article 2

1-1-1973

# Collyer Insulated Wire: The NLRB Further Opens the Gate toward Total Industrial Self-Regulation

Bruce E. Allen

# COMMENTS

## COLLYER INSULATED WIRE: THE NLRB FURTHER OPENS THE GATE TOWARD TOTAL INDUSTRIAL SELF-REGULATION

### INTRODUCTION

*The Significance of the Collyer Decision*

In *Collyer*[1] the National Labor Relations Board has determined to defer its jurisdiction in regard to the adjudication of Unfair Labor Practice complaints, as specified in the National Labor Relations Act, to the signatories of a collective-bargaining agreement which contains a grievance-arbitration clause. This decision is representative of a growing number of labor decisions through which the National Labor Relations Board is attempting to modernize the regulatory machinery provided in the National Labor Relations Act. With this decision, the National Labor Relations Board has taken one further step to provide for the total self-regulation of industry. Whether such actions are in accord with present congressional thinking remains open to dispute. It would appear that the National Labor Relations Board is making a concerted effort to force Congress either to acquiesce in this current trend of decisions, or to declare its own intentions, via legislative action, with regard to the regulation of American industry. Until Congress takes action, however, the National Labor Relations Board continues to seek modernization of the regulatory powers granted to it by the National Labor Relations Act through its semi-judicial decisions. The purpose of this comment is to explore this "contest" whose outcome will have a significant effect upon the regulation of American industry and the future negotiation of collective-bargaining agreements. This discussion will be concerned with an analysis of the *Collyer* decision; with an attempt to illustrate the rationale utilized by the National Labor Relations Board in its effort to determine Congressional intent in regard to industrial self-regulation.

1. Collyer Insulated Wire, A Gulf and Western System Co., and Local Union 1098, International Brotherhood of Electrical Workers, AFL-CIO, 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931 (1971).

*The Development of Labor Legislation*

The entire gamut of labor legislation has been conceived in response to the relative strength of the American union movement in its drive to gain equal bargaining power with industrial management. Beginning in 1935 with the adoption of the National Labor Relations Act (Wagner Act)[2], the government, acting under the New Deal philosophy of job security for American labor, sought to provide a secure base for the continued development of labor unions.[3] To accomplish these ends, the National Labor Relations Act (commonly known as the N.L.R.A. or "the Act") protected the right of unions to organize and to represent their membership in collective-bargaining agreements free from employer interference.[4] The Act also defined a series of unfair labor practices to control the actions of employers in their attempts to frustrate the growth of the fledgling unions.[5] To insure compliance with these regulations, the Act created the National Labor Relations Board (commonly referred to as the N.L.R.B. or "the Board").[6] It is the Board's function to administrate the tenets of the National Labor Relations Act by investigating and adjudicating unfair labor practice complaints.

With the onslaught of World War II and its consequent drain on American manpower, the union movement underwent a dramatic change. Rather than fighting to establish an identity within industry, the unions became a dominant industrial force in themselves.[7] Their strength was amply demonstrated through a number of crippling postwar strikes which served to paralyze the nation's economy.[8] As a result of this awesome display of raw union power, the movement frightened away a great deal of its popular support.[9] It was evident that the unions were on the path to becoming an indestructible economic giant. In time, without proper supervision and control, the unions would soon become the dominant force in American industry and possess the ability to exercise complete control over the destiny of the American industrial movement.[10]

In response, Congress felt compelled to stem the increasing

2. National Labor Relations Act 1935 (Wagner Act), ch. 372, 49 Stat. 449 [hereinafter cited N.L.R.A.], 29 U.S.C. §§ 151-68 (1970).
3. R. Corley & R. Black, THE LEGAL ENVIRONMENT OF BUSINESS 542 (2d ed. 1968).
4. N.L.R.A. § 7, 29 U.S.C. § 157 (1970).
5. N.L.R.A. § 8(a), 29 U.S.C. § 158(a) (1970).
6. N.L.R.A. § 3, 29 U.S.C. § 153 (1970).
7. *See* note 3, *supra*, at 543.
8. *Id.*
9. *Id.*
10. *Id.*

power of the labor unions. This reaction is reflected in the Labor Management Relations Act (Taft-Hartley Act)[11] of 1947. Congress intended the Taft-Hartley Act to so amend the National Labor Relations Act as to strike a balance between management and labor.[12] The provisions of the Taft-Hartley Act included: the designation of unfair labor practices;[13] an 80 day "cooling off" period to avert public-endangering strikes and lock-outs;[14] and the creation of the Federal Mediation and Conciliation Service to aid in the settlement of disputes.[15] In addition, Section 301[16] of the Taft-Hartley Act made the union and the employer subject to suit by one another, or by the individual employee. It also served to outlaw the "closed shop" agreement whereby a union could insist that only union personnel would be hired within the particular industry.[17]

*Current State of Federal Labor Law*

While the face of American industry has undergone rapid alteration there has been relatively little change to federal labor regulation since the adoption of the Taft-Hartley Act in 1947. Among those advocating reformation and modernization of the federal regulatory machinery is Edward B. Miller, the current chairman of the National Labor Relations Board.[18] It is Chairman Miller's opinion that the present law is too rigid, and thus unable to meet the current demands of modern labor practice.[19] While the National Labor Relations Act and the Taft-Hartley amendments to that Act represented a great break-through in the area of federal labor regulation, they have now lost their effectiveness and must stand aside for more enlightened regulation.[20]

One of the current difficulties facing the Board, while operating under the current regulations, is the necessity to attempt to assess congressional intent in ruling upon modern labor agreements. Does Congress desire strict compliance with the language of the Act? Or would Congress prefer that the greater emphasis be placed upon the "voluntary" settlement of labor grievances, including complaints of unfair labor practices?

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11. Labor Management Relations Act, 1947 (Taft-Hartley Act) ch. 120, 61 Stat. 136 [hereinafter cited L.M.R.A.], 29 U.S.C. §§ 141-44, 171, 173-87 (1970).
12. *See* note 3, *supra*, at p. 557.
13. N.L.R.A. § 8(b), 29 U.S.C. § 158(b) (1970).
14. L.M.R.A. §§ 206-10, 29 U.S.C. §§ 176-80 (1970).
15. L.M.R.A. § 202, 29 U.S.C. § 172 (1970).
16. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).
17. N.L.R.A. § 8(b)(2), 29 U.S.C. § 158(b)(2) (1970).
18. BNA, "*Daily Labor Report*" No. 167, p. D-1, (Aug. 27, 1971).
19. *Id.*
20. *Id.*

*An Example of This Dilemma*

An appropriate example of this dilemma is presented in *Collyer Insulated Wire*,[21] in which the Board attempted to establish an administrative precedent, but was forced to speculate upon present congressional intent in interpreting the Act. It is the Board's contention, in light of past congressional and Supreme Court expressions encouraging the self-regulation of labor, that if the parties have included a grievance and arbitration clause in their collective-bargaining agreement, then all disputes, including unfair labor practices, should be determined under the provisions of that clause. To reach this result, the Board has had to interpret the Act freely. A careful examination of the *Collyer* decision will demonstrate this dilemma and will illustrate the circuitous route which the Board had to follow in order to establish its views in this area.

## AN ANALYSIS OF THE BOARD'S OPINION IN *COLLYER INSULATED WIRE, A GULF AND WESTERN SYSTEM CO. AND LOCAL UNION 1098, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO*, 192 NLRB No. 150.

*Situation*

The Collyer company was faced with a steady loss of its skilled maintenance personnel (plant engineers and electricians) because of its inability to offer an attractive wage under its collective-bargaining agreement with the union. Under the wage scheme encompassed in this agreement, production workers were paid on an incentive basis,[22] while the wage rate for skilled maintenance personnel was determined on an hourly basis. Throughout their bargaining relationship, Collyer had routinely made adjustments in the incentive rates for production personnel to reflect new or changed production methods. Under this agreement, the only means available to effect changes in the wage rate for skilled maintenance personnel was through an upgrading in the job evaluation or by modification of the duties in an existing job classification.

During the current contract negotiations, Collyer urged that it be allowed to increase the wage rates for skilled maintenance personnel in order to place their salaries on a par with those of

21. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931 (1971).

22. Under an "incentive" pay system the employee is paid upon the basis of the number of units which he produces. In effect, he receives a base salary with the ability of increasing that salary through a higher rate of production than is adjudged as the norm by the employer.

competing industries. The union refused to allow these raises unless there was a corresponding raise for production personnel. Unable to come to any agreement on this issue, the parties agreed to leave the matter open for further negotiations after the execution of their new collective-bargaining agreement. At a series of meetings following the conclusion of the contract negotiations, Collyer again unsuccessfully attempted to institute raises for the skilled maintenance personnel. Finally Collyer acted unilaterally and announced to the union that it was going to institute a wage increase of 20¢ per hour for all skilled maintenance personnel. The union protested this move and restated its desire for a re-evaluation of all jobs at the plant. Collyer agreed to reconsider a complete re-evaluation upon the union's consent to the upward wage raise for the skilled maintenance personnel. The union refused, and Collyer instituted the proposed wage raises.[23]

The collective-bargaining agreement between Collyer and the union contained a detailed grievance and arbitration procedure which required the submission of all contract disputes to arbitration. Rather than following that grievance-arbitration procedure, the union bypassed the collective-bargaining agreement and filed an unfair labor practice complaint with the National Labor Relations Board. In its complaint, the union charged that Collyer had instituted unilateral changes contrary to the provisions of the collective-bargaining agreement.[24]

A Trial Examiner was dispatched by the Board to investigate the charges and to determine their validity. The Trial Examiner determined that the parties had discussed these proposed wage changes, and that the union had not agreed to the proposed changes. It was further determined that the collective-bargaining agreement did not authorize Collyer to act unilaterally by reassignment and wage raises. In so acting, Collyer had attempted to ignore the basic wage provisions contained in the agreement. The Trial Examiner concluded that, with the exception of the rate changes in the incentive rates, Collyer's actions were in violation of the collective-bargaining agreement, and hence constituted an unfair labor practice under Section 8(a)(1) and (5) of the Act, Refusal to Bargain.[25]

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23. Collyer's unilateral action involved a re-evaluation of the skill factor for maintenance personnel who were reassigned to "worm gear" removal; plus changes in the incentive rates for extruder operators.

24. 192 N.L.R.B. No. 150 at —, 77 L.R.R.M. at 1932.

25. *Id.* at —, 77 L.R.R.M. at 1934, citing N.L.R.A. § 8(a)(1) & (5), 29 U.S.C. § 158(a)(1) & (5) (1970). This section provides that it shall be an unfair labor practice *for an employer* "to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a) [29 U.S.C. § 159(a)]." (Section 8(a)(1) makes it an unfair labor practice "to in-

Collyer appealed the Trial Examiner's determination to the Board, arguing that this dispute arose entirely from the contract between the parties and should be settled by the arbitration machinery prescribed in that agreement. The main issue to be decided by the Board was therefore whether the National Labor Relations Board ought to defer its jurisdiction and require the parties to rely upon the terms of their collective-bargaining agreement for settlement by arbitration.

*The Board Seeks To Review Its Position In Regard To Arbitration Agreements and Awards*

*Can the Board defer to an arbitration award?* In answering this question the *Collyer* majority points to the fact that past appellate and United States Supreme Court decisions have never questioned the Board's ability to defer to an arbitrator's award. This fact is illustrated in two appellate court decisions, *Sinclair Refining Co. v. NLRB*,[26] and *Timken Roller Bearing Co. v. NLRB*.[27] The Supreme Court decision in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*,[28] also reflects this point of view.

In *Sinclair* the union filed a complaint with the Board in an effort to force the company to produce relevant information to be used by an arbitrator in rendering his award. The Board construed the complaint as detailing an unfair labor practice under Section 8(a) (5) of the Act.[29] The court ruled that where the parties have prescribed a voluntary grievance procedure, the courts should enforce the utilization of such procedure and refrain from determining the merits of the controversy at issue.[30] Therefore, it is up to the arbitrator to fashion his own discovery procedure, and the Board's ruling should have no effect.[31]

In *Timken* the company refused to negotiate grievances during an illegal strike. In response to a complaint filed by the union the Board issued a cease and desist order requiring the company to negotiate these grievance claims. The company petitioned the court to have this order set aside. The court determined that no provision of the Act either expressly or by implication limited the right of the parties to a collective-bargaining

terfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" and is cited whenever there has been a violation of any of the other unfair labor practice provisions.)

26. 306 F.2d 569 (5th Cir., 1962).
27. 161 F.2d 949 (6th Cir., 1947).
28. 403 U.S. 274 (1971).
29. N.L.R.A. § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970).
30. 306 F.2d 569, 575.
31. *Id.* at 578-79.

agreement, and that an arbitration procedure should be considered as part of the collective-bargaining agreement.[32] Therefore, the court concluded that there was no commission of an unfair labor practice and that the employer's efforts to channel all disputes, including the illegal strike, into the arbitration machinery provided by their collective-bargaining agreement did not constitute a refusal to bargain, nor provide any showing of bad faith on the part of the employer.

The *Lockridge* decision presents the latest Supreme Court pronouncement on the subject of collective-bargaining and the ability of the parties to resolve their own disputes through mutually agreeable grievance-arbitration procedures. In this case, Lockridge was discharged on the ground that he had forfeited his membership in good standing with the union by failing to keep current with his union dues. Because of this failure to maintain his "good standing" status, the employer was obligated to discharge Lockridge under the union security agreement contained in the collective-bargaining agreement between the union and the employer. Lockridge brought suit in the state courts against the union.[33] In deciding this case, the Supreme Court relied upon the rule stated in *San Diego Building Trades Council v. Garmon*[34] which held that the National Labor Relations Board preempts state and federal court jurisdiction where the conduct in controversy is either protected or prohibited by the Act.[35] However, the court did note some exceptions to this rule. One exception may arise where the Board has affirmatively indicated that, in its view, pre-emption would not be appropriate.[36] As a second exception to the *Garmon* rule, the court determined that collective-bargaining agreements under Section 301[37] are also exempted.[38] This second exception was based solely on the expressed congressional desire for the voluntary settlement of labor disputes which fall under collective-bargaining agreements.[39]

On the basis of these decisions the Board determined that it did have the ability to defer to an arbitration award without creating a significant break with past Board policy and precedent.

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32. 161 F.2d 949, 954.

33. *See* Lockridge v. Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees, 93 Idaho 294, —, 460 P.2d 719, 724 (1969); wherein the state court found the union to have violated §§ 8(b)(1)(a) and 8(b)(2) which "probably causes" the employer to violate § 8(a)(3). Case was brought to the Supreme Court on the basis of a "federal question" by the union.

34. 359 U.S. 236, (1959) *cited at* 403 U.S. 274, 276 (1971).

35. 403 U.S. 274, 284 (1971).

36. *Id.* at 298 n.8.

37. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).

38. 403 U.S. 274, 300-01 (1971).

39. *Id.*

*The Board is granted exclusive jurisdiction under Section 10(a) of the Act to adjudicate unfair labor practice complaints.* The *Collyer* majority next examines its authority to adjudicate unfair labor practice complaints under Section 10(a)[40] of the Act. This section grants the Board exclusive jurisdiction over unfair labor practice complaints. However, there is nothing in the Act which intimates that the Board is *required* to exercise its jurisdiction where mutually acceptable remedies are apparent on the face of the collective-bargaining agreement.[41] In other words, there is nothing in the language of the Act which requires the Board to exercise its authority over unfair labor practice complaints arising under Section 8[42] of the Act.

*The Taft-Hartley amendments provide machinery for the voluntary settlement of labor disputes.* At this juncture the *Collyer* majority attempts to illustrate situations in which the courts have upheld deferral of jurisdiction for settlement under a collective-bargaining agreement. This argument becomes somewhat strained as they attempt to analogize cases which were decided under Section 301[43] of the Act as present authority to permit deferral of jurisdiction under Section 8 (Unfair Labor Practices).[44] To support this argument, the majority looks to *Carey v. Westinghouse*[45] and *Smith v. Evening News Assn.*[46]

In *Carey* there was a jurisdictional dispute between two unions which represented the employees in one plant. The employer refused to arbitrate this grievance on the ground that it presented a representation issue which could only be determined by the N.L.R.B. On hearing the issue, the U.S. Supreme Court determined that the Board had the power to give effect to a private agreement under Section 10(k)[47] of the Act, and further that such resolution was clearly intended by Congress with the passage of that section.[48] The court continued by finding that although the parties have pursued a private remedy, they are not to be foreclosed from filing charges with the Board if they are dissatisfied with their private solution.[49] The Board then has the choice of either finding that the private award was fair and not

40. N.L.R.A. § 10(a), 29 U.S.C. § 160(a) (1970).
41. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1943 (1971).
42. N.L.R.A. § 8, 29 U.S.C. § 158 (1970).
43. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).
44. N.L.R.A. § 8, 29 U.S.C. § 158 (1970).
45. 375 U.S. 261 (1964).
46. 371 U.S. 195 (1962).
47. N.L.R.A. § 10(k), 29 U.S.C. § 160(k) (1970).
48. 375 U.S. 261, 264-65 (1964); wherein the Court quotes 93 Cong. Rec. 4035, 2 Leg. Hist. L.M.R.A. (1947) 1046.
49. *Id.* at 270-71.

repugnant to the Act, or adjudicating the issue under the provisions of the Act.[50] Though this case concerned disputes arising under Section 301[51] of the Act, the court does imply that the same principles of private settlement would apply to unfair labor practice complaints.

In *Smith* the petitioner brought an action on behalf of himself and other assignee union members. In his complaint, Smith claimed that he was unwillingly locked-out from his place of work because of a strike being conducted by another union. It was Smith's contention that as long as he was ready, willing and able to work, he should be paid in the same manner as management personnel, who were paid during the strike although there was no work for them to perform. The Supreme Court heard this case and determined that the action complained of fell under the provisions of Section 301[52] of the Act. It further determined that the the state court could exercise jurisdiction in the matter.[53] In its opinion, the court stated that the Board can deal with an unfair labor practice which also violates a collective-bargaining agreement. However, the Board cannot demand exclusive jurisdiction which denies the courts the ability to render a decision under the provisions of Section 301 and the terms of the collective-bargaining agreement.[54]

To buttress the argument made by *Carey* and *Smith*, the *Collyer* majority reviews those sections of the Act which directly provide for or encourage arbitration. In this discussion the Board looks to Section 203(d)[55] in which Congress declared that:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

The majority next looks to Section 301,[56] which allows state or federal court suits to enforce collective-bargaining agreements, as indicative of congressional intent for the creation of a voluntary labor system. In its opinion, the *Collyer* majority states:

> Admittedly, neither section 203 nor section 301 applies specifically to the Board. However, labor law as administered by the Board does not operate in a vacuum isolated from

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50. *Id.* at 271-72.
51. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).
52. L.M.R.A. § 301, 29 U.S.C. § 185 (1970); cited at 371 U.S. 195, 201 (1962).
53. 371 U.S. 195, 200 (1962).
54. *Id.* at 197.
55. L.M.R.A. § 203(d), 29 U.S.C. § 173(d) (1970).
56. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).

> other parts of the Act, or, indeed, from other acts of Congress. In fact, the legislative history suggests that at the time the Taft-Hartley amendments were being considered, Congress anticipated that the Board would develop by rules and regulations, a policy of entertaining under these provisions only such cases . . . as cannot be settled by resort to the machinery established by the contract itself, voluntary arbitration. . . .[57]

To illustrate this acceptance of arbitration under collective-bargaining agreements, the *Collyer* majority discusses those Supreme Court cases commonly referred to as the *Steelworkers* Trilogy[58] and *Southern Steamship Co. v. NLRB*[59] as appropriate authority for the Board's analogy between Section 301[60] cases and those which arise under Section 8[61] of the Act.

The *Steelworkers* Trilogy cases were decided under Section 301,[62] and upheld the principle of arbitration as a means of voluntary settlement of management-labor contract disputes. In these decisions the Supreme Court declared that the only role granted to a lower federal or state court in enforcing an arbitration agreement is to determine that the matter in dispute does, indeed, fall within the confines of the collective-bargaining agreement. It is not the role of the lower courts to attempt to determine the merits of the controversy, but solely to provide enforcement of the arbitration procedure.[63]

In *Southern Steamship*, the Board ordered that the employees aboard the company's seven ships hold elections to determine which union was to represent them as their collective-bargaining agent. On all but one ship, the employer's representatives were allowed to monitor these elections. On the seventh ship, the union denied the employer's representative admission to the election. As a result of this denial, the employer refused to recognize the election results and the certification of the union as the collective-bargaining representative for its employees. Despite the employer's objection to the election, the Board certified the union as the bargaining agent. Six months later, the union filed an unfair labor practice complaint with the Board charging the peti-

57. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1935 (1971); *quoting* S. Rep. No. 105, 80th Cong., 1st Sess., 23 Leg. Hist. of L.M.R.A. 1947, p. 429.

58. United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

59. 361 U.S. 31 (1942).

60. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).

61. N.L.R.A. § 8, 29 U.S.C. § 158 (1970).

62. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).

63. 363 U.S. 564, 568 (1960).

tioner with refusing to bargain. As a result of this refusal a strike had been called which resulted in the dismissal of 25 union members. These discharges were determined by the Board to be solely due to the employees' membership in the union. In ruling upon the complaint, the Board determined that the employer was liable for a refusal to negotiate and issued a cease and desist order in conjunction with an order for the reinstatement of the discharged employees. The employer objected to this order, and the matter was eventually brought before the Supreme Court. The court ruled that although the Board could determine pertinent certification procedures, it cannot effectuate the policies of labor relations so single-mindedly as to totally ignore other congressional objectives. It is necessary to look to the entire scope of congressional objectives in order to accommodate one statutory scheme and intent with another.[64] In other words, the court was telling the Board that it should strive to allow the voluntary settlement of disputes wherever and whenever possible; thus accentuating the stated and intended congressional policy of industrial self-regulation.

*Situations Under Which The Board Seeks To Defer To Arbitration*

The question of whether the Board should defer its processes to an arbitrator's decision arises only when an alleged violation of the Act also breaches a collective-bargaining agreement which contains a grievance-arbitration procedure. This situation, as illustrated in *Collyer*, requires an accommodation between statutory policy favoring the fullest use of collective-bargaining, and the provisions of the National Labor Relations Act reflecting a strict jurisdictional grant to the National Labor Relations Board to adjudicate unfair labor practices.

Past cases indicate that the Board has deferred its jurisdiction where there is an existing arbitration clause, and where; 1) there is an existing award, or 2) where no award has yet issued.

*Where there has already been an arbitral award.* In the Board hearing of the *Timken Roller Bearing*[65] case, the Board refrained from exercising its jurisdiction in deference to an arbitrator's award, although it would have been able to find an unfair labor practice. The Board explained its decision to defer jurisdiction in this manner: "It would not comport with the sound exercise of our administrative discretion to permit the Union to

64. 316 U.S. 31, 47 (1942).

65. Timken Roller Bearing Co. and United Steelworkers of America, 70 N.L.R.B. 500, 18 L.R.R.M. 1370 (1946).

seek redress under the Act after having initiated arbitration proceedings which, at the Union's request, resulted in a determination upon the merits."[66]

This policy was further refined with the Board's decision in *Spielberg Manufacturing Co.*[67] In that case, as part of a strike settlement, the parties agreed to arbitrate whether four of the strikers should be reinstated in spite of the employer's objection to their conduct on the picket lines. All of the parties were represented at the arbitration hearing where it was decided that the employer was not required to rehire these personnel. The discharged employees then filed an unfair labor practice complaint against the employer. The Trial Examiner recommended that a cease and desist order be issued in conjunction with an order requiring the employer to rehire the discharged employees. In its determination, the Board dismissed the complaint and deferred its jurisdiction to the arbitration award.[68] It found that the arbitration proceedings had been fair to all parties, that all parties had agreed to the principle of binding arbitration, and that the award was not repugnant to the purposes and policies of the Act.[69] Under such circumstances, the opinion declared, the Board would find it desirable to encourage a voluntary settlement of a labor dispute.[70] The standard announced in the *Spielberg* decision has become the Board's test whenever it considers deferral of its jurisdiction to an arbitrator's award.

*Cases in which no arbitration award has been issued.* The Board's past policy in regard to deferral of jurisdiction where no award has been issued is less well defined than where an award has already been made. At times, the Board has dealt with the unfair labor practice complaint despite the presence of an arbitration agreement. In other situations, the Board has simply decided to leave the disputants to their contractual remedies.

As an illustration of those situations in which the Board has deferred to an arbitration agreement in which there was no award, the Board cites *Consolidated Aircraft Corp.*,[71] and *Jos. Schlitz Brewing Co.*[72]

In *Consolidated Aircraft*, the parties had an agreement in

66. *Id.* at 501, 18 L.R.R.M. at 1371.
67. Spielberg Manufacturing Co. and Harold Gruenberg, 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).
68. *Id.* at 1082, 18 L.R.R.M. at 1153.
69. *Id.*
70. *Id.*
71. Consolidated Aircraft Corp. and Machinists Lodge 1125, 47 N.L.R.B. 694, 36 L.R.R.M. 44 (1943).
72. Jos. Schlitz Brewing Co. and Brewery Workers Local 9, 175 N.L.R.B. 141, 70 L.R.R.M. 1472 (1969).

which Consolidated recognized the union as the exclusive bargaining agent of all hourly paid employees and salaried inspectors, with the exception of supervising inspectors and confidential clerks. There was no union security agreement, but Consolidated agreed to recommend union membership to all new employees, and further agreed not to discriminate against or intimidate any employee because of his union membership. The agreement contained a collective-bargaining provision which eventually led to binding arbitration. In a complaint filed with the Board, the union claimed that Consolidated discriminated against the union by discouraging union membership among its employees. The Board found that Consolidated was guilty of an unfair labor practice in that it was interfering with, coercing, and restraining employees who might otherwise join the union. However, the Board dismissed a second complaint that Consolidated refused to bargain, in that it had agreed to submit the union's grievance to binding arbitration.[73] In this instance, the Board deferred its jurisdiction to allow the arbitrator's award to reflect the final determination of this matter.

The *Schlitz Brewing Co.* decision is almost directly analogous to that rendered in *Collyer.* Here the employer decided to close down the production line during employee coffee breaks rather than provide relief workers to maintain the line. This action was taken without any negotiation. The union filed an unfair labor practice complaint charging the employer with a violation of Section 8(a)(5)[74] in that it had initiated a unilateral change which it had refused to negotiate. The Board determined that the resolution of this dispute should be left to the parties under their grievance-arbitration procedure.[75]

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73. 47 N.L.R.B. 694, 705-07 (1943).

74. N.L.R.A. § 8(a)(5), 29 U.S.C. § 158(a)(5) (1970), *supra*, n.15.

75. 175 N.L.R.B. 141, 142, 70 L.R.R.M. 1472, 1475 (1969), wherein the Board stated:

> Thus, we believe that where, as here, the contract clearly provides for grievance and arbitration machinery, where unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties. This particular case is indeed an appropriate one for just such deferral. The parties have an unusually long and successful bargaining relationship; they have a dispute involving substantive contract interpretation almost classical in its form, each party asserting a reasonable claim in good faith in a situation wholly devoid of unlawful conduct or aggravated circumstances of any kind; they have a clearly defined grievance-arbitration procedure which Respondent has urged the Union to use for resolving their dispute; and significantly the Respondent, the party which in fact desires to abide by the terms of its contract, is the same party which, although it firmly believed in good faith in its right under the

*The Board's Decision In Collyer Insulated Wire*

*The majority opinion* The majority opinion carefully examined the circumstances between the parties to this dispute. In its analysis, the majority noted the long and productive bargaining relationship between the parties, the provision for the mutual resolution of conflicts in the collective-bargaining agreement, the absence of any claim of enmity between the parties, and the willingness of Collyer to arbitrate its unilateral action. Additionally, the arbitration provision was broad enough in scope to encompass a complete resolution of the points at issue.

On this basis, the majority determined that the dispute would be well suited for settlement through arbitration. It adopted this line in view of the fact that the entire dispute revolved about an interpretation of the parties' present contractual agreement. The Board further determined that the National Labor Relations Act should only become involved in a dispute where the arbitration agreement, examined in light of the history of negotiation and the practices of the parties, clearly does not sanction the right of one of the parties to perform a unilateral act. This threshold determination, however, is within the expertise of the arbitrator, and can be made without the Board's involvement.

The majority does not believe that it has violated the standard announced in *Spielberg*[76] by determining that the Board should defer its jurisdiction to private arbitration in the absence of an arbitral award.[77] The *Spielberg* standard prescribes that "[t]he proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act."[78] Here, the contract obligates the parties to be bound by the arbitrator's award. At this juncture, the Board is unwilling to adopt the presumption that such arbitration proceedings will fail to meet the *Spielberg* standard.[79] It is the majority's contention that the Board should maintain jurisdiction only against the chance possibility that the arbitral award would fail to meet this standard, or that the matter was not promptly brought to arbitra-

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contract to take the action it did take, offered to discuss the entire matter with the Union prior to taking such action. Accordingly, under the principles above stated, and the persuasive facts in this case, we believe that the policy of promoting industrial peace and stability through collective bargaining obliges us to defer the parties to the grievance-arbitration procedures they themselves have voluntarily established.

76. 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).

77. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1937 (1971).

78. 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955), as quoted at 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1937 (1971).

79. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1937 (1971).

tion.[80] In this manner, the parties are allowed to settle their grievances under the provisions of the arbitration clause in their collective-bargaining agreement without the Board totally relinquishing its jurisdiction as to allow the continued perpetration of an unfair labor practice or an unsatisfactory arbitral award.[81]

With its decision, the majority does not intend to enforce compulsory arbitration. Rather, the decision serves only to present the Board's desire to give full effect to the parties' own voluntary agreement to submit all disputes to arbitration.[82] By enforcing the arbitration clause of the collective-bargaining agreement, no party will be able to sidestep this provision by presenting its complaints to a higher authority.[83] If the collective-bargaining agreement is to be given any force or effect, as was intended by Congress with the passage of the Labor Management Relations Act,[84] then the Board must secure its enforcement under the provisions of the Act.[85]

Nor should the Board's decision be construed as stripping the parties of their statutory rights under the Act.[86] Courts have long recognized that industrial relations disputes may involve conduct which contravenes both the collective-bargaining agreement and the provisions of the Act. However, by having the parties follow their established grievance-arbitration procedure, experience has demonstrated that such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal and sometimes lengthy procedures provided under the Act.[87]

To support its conclusions, the majority proceeds to illustrate judicial support for arbitration by referencing the Supreme Court's decisions in *Textile Workers Union of America v. Lincoln Mills of Alabama*,[88] and *Boys Markets, Inc. v. Retail Clerks Union, Local 770*.[89] With these decisions the court points to the congressional mandate for adherence to private and voluntary means for the settlement of industrial relations disputes.

In *Lincoln Mills*[90] the court determined that Section 301[91]

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *See* note 11, *supra.*
85. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1937 (1971).
86. *Id.*
87. *Id.*
88. 353 U.S. 448 (1957).
89. 398 U.S. 235 (1970).
90. In Lincoln Mills, the respondent refused to agree to submit several disputes to arbitration, although the collective agreement contained provisions for

of the Act provided a means to enforce arbitration agreements, as well as allowing for suit by one party against the other. This interpretation of Section 301 was based upon the expressed congressional intent that arbitration agreements be given their full force and effect in preference to any action taken either by the courts or the National Labor Relations Board.[92] However, the decision does provide that the law to be applied in enforcing arbitration agreements must be federal law drawn from the National Labor Relations Act.[93]

In *Boys Markets*,[94] the court determined whether a state court can issue an injunction under Section 301,[95] or whether such an action would violate Section 7 of the Norris-LaGuardia Act.[96] After reviewing the development of federal labor legislation, the court found that to implement congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes, equitable relief must be available in both federal and state courts. In this regard, Section 7 of the Norris-LaGuardia Act cannot serve to deprive the parties to an arbitration agreement of their right to seek equitable relief in any court under the provisions of Section 301.[97]

With these two decisions, the Supreme Court has provided that any party to an aribitration agreement has effective legal means to insure faithful performance under that agreement. For this reason, the *Collyer* majority concludes that it is consistent with the fundamental objective of federal law to require the parties to an arbitration agreement to honor their contractual obligations, rather than allowing them to ignore their respective agree-

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such a procedure. The union then brought suit under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185 (1970)) to compel the respondent to arbitrate these differences.

91. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).

92. 353 U.S. 448, 451 (1957).

93. *Id.* at 456.

94. In Boys Markets the petitioner and the respondent were parties to a collective-bargaining agreement which contained an arbitration clause. A dispute arose when the union demanded that certain stock work be performed exclusively by the union personnel. Petitioner then sought to invoke the grievance-arbitration procedure to settle this dispute, and demanded that the union cease its work-stoppage. The union refused. The petitioner then sought to enjoin the strike through the state courts. This action brought the matter before the United States Supreme Court. The issue before the court was whether the state court could issue an injunction under Section 301 (L.M.R.A. § 301, 29 U.S.C. § 185 (1970)), or whether such an action would be in violation of Section 7 of the Norris-LaGuardia Act (29 U.S.C. §§ 101-15 (1970)).

95. L.M.R.A. § 301, 29 U.S.C. § 185 (1970).

96. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1970), Section 7 of the Norris-LaGuardia Act curtails the ability of the federal courts to issue injunctions against labor unions.

97. 398 U.S. 235, 253 (1970).

ments by casting their disputes in statutory terms. It is for these reasons that the Board dismissed the complaint against Collyer, but retained jurisdiction for the limited purpose of determining whether the subsequent arbitral award would be within the prescription of the *Spielberg*[98] standard. The Board hopes that this decision will dispel any conclusion that the Board has approved a policy favoring the "dual" litigation of similar disputes before both an arbitrator and the Board.[99]

*The minority view* The minority opinion follows much the same course as the majority members'. They too are forced into an examination of past court and Board decisions in a vain effort to find language which directly supports their point of view. Unable to find direct support, the minority is compelled to base its arguments upon inferential reasoning from case decisions.

From the two minority opinions, three viable arguments are presented. It is first contended that the majority decision will lead to the elimination of statutory rights guaranteed to the individual employee.[100] In support of this argument, the minority points to the rule of the decision which compels all parties subject to a collective-bargaining agreement containing a grievance-arbitration provision to submit all labor disputes to arbitration, including unfair labor practice complaints. Since the individual employee is recognized as a party to the collective-bargaining agreement via his membership in the signatory union, this ruling would force him to arbitrate his individual disputes against either the union or the employer.

This argument was recognized by Chairman Miller after the issuance of the Board's decision. He admits the error of failing to include a guaranty of individual statutory rights, but states that the majority had no intention of depriving the employee of these rights.[101] In short, the individual employee will always maintain his direct access to the Board.

The second argument advanced by the minority concerned the Board's ability to defer its authority in the settlement of unfair labor practice complaints to private arbitration.[102] This argument cannot be answered immediately, for the courts have yet to rule upon this issue. However, any further decision by the courts will require that they attempt to balance the two congressional objectives in federal labor regulation: (1) the Taft-Hartley

98. 112 N.L.R.B. 1080, 36 L.R.R.M. 1152 (1955).
99. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1938 (1971).
100. *Id.* at —, 77 L.R.R.M. at 1942, 1946-47.
101. *See* note 11, *supra*, at D-3.
102. 192 N.L.R.B. No. 150, —, 77 L.R.R.M. 1931, 1943 (1971).

amendments to the N.L.R.A. favoring the voluntary self-regulation of labor-management relations and (2) the strict standards of federal regulation found in the original Act.

A third argument concerns the field of arbitration in general and the ability of arbitrators to fairly and correctly judge unfair labor practice complaints.[103] It is the contention of the minority that arbitrators as a group lack the necessary legal and technical expertise to effectively rule on these issues. In the minority's view, only the Board, with its trained legal and technical staff, has the ability to fairly and judiciously adjudicate these disputes.

### CONSIDERATION OF THE ARBITRAL PROCESS

Over the years there has been a great deal of critical comment regarding the arbitration process and the ability of the individual arbitrator to successfully resolve labor disputes.[104] The majority of writers favor arbitration as the only available means of achieving a completely voluntary system of industrial self-regulation. However, the critics of the system point to its inequities, claiming that at best it presents a mediocre procedure for the settlement of contractual disputes, and that it is not at all suited for the adjudication of unfair labor practice complaints.

The proponents of arbitration point to speed and dexterity in rendering an award as its main advantage.[105] In essence, the arbitral process envisions a trained expert coming to the situs of the controversy, hearing the presentations of both sides to the dispute, and then rendering an award based upon the presentations, the provisions of the collective-bargaining agreement, and his own expertise in the industry. This positive view is apparently widely shared; 94% of all collective-bargaining agreements contain grievance-arbitration machinery.[106]

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103. *Id.* at —, 77 L.R.R.M. at 1948-49.

104. *See*: Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969); Cohen, *NLRB: Poacher on the Arbitral Domain*, 55 A.B.A.J. 437 (1969); Abramson, *NLRB: Is The Sheriff Not the Poacher*, 55 A.B.A.J. 853 (1969); Comment, *The NLRB and Deference to Arbitration*, 77 YALE L.J. 1191 (1968); Comment, *NLRB v. Strong: The Board Versus The Courts & Arbitration*, 23 S.W.L.J. 756 (1969); Davey, *Restructuring Grievance Arbitration Procedures: Some Modest Proposals*, 54 IOWA L. REV. 560 (1969); Bond, *The Concurrence Conundrum: The Overlapping Jurisdiction of Arbitration & The National Labor Relations Board*, 42 S. CAL. L. REV. 4 (1968); Block, *The NLRB & Arbitration: Is The Board's Expanding Jurisdiction Justified?*, 19 LABOR L.J. No. 10 (1968).

105. Cohen, *NLRB: The Poacher on the Arbitral Domain*, 55 A.B.A.J. 437 (1969).

106. Bond, *The Concurrence Conundrum: The Overlapping Jurisdiction of Arbitration and the National Labor Relations Board*, 42 S. CAL. L. REV. 4, 6 (1969).

The critics of the system point to the fact that an arbitrator is not required to have any legal training.[107] If he has not been legally trained, they argue, he can have no appreciation of the use of *stare decisis* in establishing a uniformity of decisions within a particular industrial field. Also, without legal training the arbitrator would be unable to recognize illegal contract provisions, or to properly interpret and apply federal and state statutes with regard to a written agreement or an unfair labor practice complaint. The result of these procedural errors which could occur as a direct result of the arbitrator's lack of legal training would be a denial of procedural due process to the parties in dispute.[108]

In addition to examining the qualifications of the individual arbitrator, the critics have also taken the entire arbitration process to task. They first point to the fact that there are no uniform rules among the three major arbitrators' associations.[109] Further, the arbitrator does not possess the means of enforcing his decision.[110] Additionally, the arbitrator is only able to bind the signatories to the collective-bargaining agreement,[111] and may even find that the agreement which gives him jurisdiction also sets exacting limitations upon his ability to adjudicate the issues before him.[112] Once the award has been rendered, there is no clear definition of the legal status to be assigned to it.[113]

## CONCLUSION

It is true that there are problems with the arbitral process as it is presently constituted. However, this does not mean that these problems cannot be solved, or that arbitration cannot be a fair and equitable means for insuring the private settlements of labor disputes. With its decision in *Collyer,* the Board has given a new status and recognition to arbitration. However, in order to protect arbitration from its critics, the Board should establish uniform standards and regulations for the arbitration profession. By standardizing the arbitral process, the Board could guarantee procedural due process, while insuring that all awards are rendered in light of the latest Board pronouncements regarding federal labor

107. Christensen, Book Review, 19 STAN. L. REV. 671 (1967); *see also* Comment, *The NLRB and Deference to Arbitration,* 77 YALE L. J. 1191, 1194-95, n.28 (1968).

108. 19 STAN. L. REV. 671, 676 (1967).

109. Davey, *Restructuring Grievance Arbitration Procedures,* 54 IOWA L. REV. 560 (1969).

110. Dunau, *Three Problems in Labor Arbitration,* 55 VA. L. REV. 427, 439 (1969).

111. 77 YALE L. J. 1191, 1195 (1968).

112. 55 VA. L. REV. 427, 447 (1969).

113. 19 STAN. L. REV. 671, 676 (1967).

policy. Such an enactment would also allow the Board a chance to review the awards rendered on unfair labor practice complaints to insure their compliance with the *Spielberg*[114] standard.

To date the *Collyer* decision has remained intact. It is more than likely that this decision will continue to prevail because, in reality, it does not represent so radical an innovation. Reviewing the entire development of federal labor policy, the *Collyer* decision represents only the next natural step toward the pre-existing goal of total industrial self-regulation. The significance of the *Collyer* decision is that it clearly states the National Labor Relations Board's adoption of this goal.

*Bruce E. Allen*

114. 112 N.L.R.B. 1080, 1082, 18 L.R.R.M. 1152, 1153 (1955).